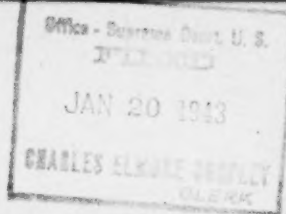


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# Supreme Court of the United States

OCTOBER TERM, 1942

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No. 662 - 663

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JOHN T. DEMPSEY, AS ADMINISTRATOR OF THE ESTATE OF  
GABRIEL DE FONTARCE, DECEASED,

*Petitioner,*

*vs.*

GUARANTY TRUST COMPANY OF NEW YORK,  
A CORPORATION,

*Respondent.*

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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.

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NORMAN CRAWFORD,  
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# Supreme Court of the United States

OCTOBER TERM, 1942

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No.

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JOHN T. DEMPSEY, AS ADMINISTRATOR OF THE ESTATE OF  
GABRIEL DE FONTARCE, DECEASED,

*Petitioner,*

*vs.*

GUARANTY TRUST COMPANY OF NEW YORK,  
A CORPORATION,

*Respondent.*

---

## PETITION FOR WRIT OF CERTIORARI.

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*To the Honorable, the Supreme Court of the United States:*

### **Summary Statement of Matter Involved.**

Your petitioner, John T. Dempsey, as Administrator of the Estate of Gabriel de Fontarce, Deceased, praying for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit dismissing two appeals for lack of "appellate jurisdiction"

(on the ground such appeals present "a moot question") from the District Court of the United States for the Northern District of Illinois, Eastern Division, respectfully submits:

John T. Dempsey, petitioner, was appointed (upon the petition of a creditor) by the Probate Court of Cook County, Illinois, administrator of the Estate of Gabriel de Fontarce, a Free Frenchman who died in London, England, in June of 1941 and who at the time of his death was domiciled either in Great Britain, Egypt, Eire or France (R. 4-5, 117). In his sworn complaint petitioner showed that defendant, a New York corporation *authorized to do and doing business in Illinois*, held physical possession as mere custodian or depositary, of certain securities called "Kaffirs" of a value of \$120,000 belonging to the decedent (R. 3-5). Petitioner sought recovery of these securities so that they might be administered *in Illinois* (R. 7).

Petitioner showed that the assets and securities aforesaid were fully negotiable and that defendant would sell or otherwise negotiate them, whereby plaintiff would suffer irreparable loss and damage, unless defendant were restrained and enjoined from so doing (R. 6).

Decedent had never been resident or domiciled in the United States and his estate was being administered in England and Brazil, and possibly in Ireland, France and Monaco (R. 4-5). Petitioner showed that *decedent left no debts in any State of the United States except in Illinois* and that decedent's estate in Illinois would be *insolvent* unless defendant delivered said assets to plaintiff (R. 5).

Petitioner showed that although decedent's niece had attempted to start ancillary administration in New York, her petition had never been granted and no administration

had ever been commenced by appointment of a representative of said estate in New York; that no jurisdiction *in rem* or *in personam* had ever been obtained by the New York court; that decedent's niece had abandoned her application for probate proceedings in New York and would have moved to withdraw the same except that the New York Surrogate had stated he would refuse to permit such withdrawal; and that decedent's niece had no objection to the administration of said assets by plaintiff in the Probate Court of Cook County (R. 80-1).

Petitioner further showed that ancillary administration in New York would be utterly useless and wasteful of the assets concerned; that no inheritance, succession or other taxes were due to the State of New York on account of said assets; that the Surrogate's Court of New York had no power or authority to make any final distribution of said assets to decedent's ultimate heirs or distributees; and that New York administration would be particularly wasteful by reason of the court costs, administrator's fees and attorney's fees of such administration (R. 6-7, 77-9).

Petitioner further offered to obtain a waiver of any New York succession or other taxes on said assets or to pay any taxes found to be due and unpaid (R. 78). Petitioner showed that defendant claimed \$10.43 as custodian fees, but denied that any such sum was due. Plaintiff showed on the contrary that defendant was substantially overpaid for its custodian services on decedent's death; but plaintiff offered to pay any custodian fees found to be due or to constitute a lien or charge upon said assets (R. 79-80).

Petitioner alleged that he was without knowledge as to the physical location of the certificates evidencing the securities sued for, but that (except for possible reference

thereto) there were no assets, securities or properties belonging to decedent in New York upon which any administration proceedings could be based (R. 80-1).

Petitioner prayed that defendant be temporarily and perpetually enjoined and restrained from negotiating the securities and from instituting any temporary administration or other probate proceedings in any other court than the Probate Court of Cook County, having to do with the administration of such assets (R. 7, 81).

A restraining order was entered as prayed by the District Court on March 7, 1942, which remained in effect until April 1, 1942 when the restraining order was dissolved (R. 11-13). From this order vacating the restraining order petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit (Cause No. 8001) (R. 64).

Subsequently on May 19, 1942 the District Court dismissed the original complaint upon defendant's motion and at the same time the trial court granted plaintiff leave to amend the complaint (R. 103); and on May 26, 1942 plaintiff filed an amended and supplemental complaint containing all the allegations of the original complaint and adding substantial allegations thereto (R. 72-85). On June 18, 1942 plaintiff still further amended the complaint with leave of the trial court (R. 94-5). Defendant on June 5, 1942 moved to dismiss the amended complaint (R. 102-4), to which motion defendant filed his answer (R. 105-8) and suggestions (R. 109-113). On the same date plaintiff moved the District Court to enter an order under Rule 75 of the Federal Rules of Civil Procedure, supplementing the record in the first appeal by including therein his amended complaint (R. 86). The District Court denied this motion and from that ruling petitioner took a second appeal (Cause No. 8058) (R. 91).

The two appeals were consolidated and were jointly disposed of by the Circuit Court of Appeals (R. 115). The Circuit Court thus had before it the allegations in both the original complaint (R. 2-10) and the amended complaint (R. 72-85, 95) at the time it made its decision herein.

The Circuit Court of Appeals for the Seventh Circuit dismissed both appeals upon the ground that it had no "appellate jurisdiction" and that such appeals presented "a moot question" because, *after* the interlocutory appeal (No. 8001) was taken, "the original bill of complaint containing the prayer for injunction, the denial of which constituted the basis for the appeal, had been dismissed by the District Court with leave to file an amended complaint within ten days if appellant so desired" and because "appellant did not appeal from this dismissal, but instead, filed his amended bill within the time allowed, including another prayer for injunction." (R. 118-120). In other words the Circuit Court of Appeals held that even though the amended complaint filed with leave of the trial court was before it on the second appeal (No. 8058) it could consider the allegations of *neither* the original complaint nor the amended complaint, the latter of which had "superseceded the original one for all purposes." (R. 120).

The Circuit Court held that Section 129 of the Judicial Code "does not contemplate determination of the merits of an abandoned bill of complaint or an amended complaint subsequently filed in lieu thereof" and that "dismissal of the (original) bill entitled appellee to dismissal of the appeal from an order predicated upon that bill." (R. 120). It is to review this dismissal of the appeals for lack of "appellate jurisdiction" as a "moot question" that this petition for certiorari is filed in this Court.

### Statement of Basis of this Court's Jurisdiction.

The decision of the Circuit Court of Appeals for the Seventh Circuit in this case that it lacks "appellate jurisdiction" over this appeal directly conflicts, upon a question of Federal law, with the provisions of Section 129 of the Judicial Code and with all of the decisions of this Court and all of the other Circuit Courts of Appeals for the past forty years upon the same question.

### The Questions Presented.

There are three questions presented:

1. Did the Circuit Court of Appeals for the Seventh Circuit lack "appellate jurisdiction" of an appeal under Section 129 of the Judicial Code from an order vacating a restraining order restraining the transfer of negotiable securities, upon a showing of irreparable injury pending adjudication of plaintiff's rights thereto, because after the interlocutory appeal therefrom was taken the original complaint was dismissed, and thereupon an amended complaint was filed and the amended complaint brought before the Circuit Court upon a second appeal consolidated with the first appeal?

2. Does Rule 75 (h) of the Federal Rules of Civil Procedure permit the addition to the record on appeal of matter not before the District Court when the interlocutory order appealed from was entered?

3. Should a useless and expensive ancillary administration be permitted in one state when the courts of another state, where ancillary administration is necessary and has been commenced, have complete jurisdiction over a corporation holding assets belonging to the same decedent sufficient to compel such corporation by an *in personam* decree to deliver such assets to the administrator in the latter jurisdiction? In other

words, was there a cause of action stated in plaintiff's complaints?

### **Reasons for the Allowance of the Writ.**

Section 129 of the Judicial Code specifically grants an appeal *as a matter of right* from interlocutory orders vacating or denying restraining orders; and the uniform decisions of the several Circuit Courts of Appeals and of this Court are to the effect that the Circuit Courts of Appeals have jurisdiction of interlocutory orders vacating or denying restraining orders under Section 129 of the Judicial Code.

It therefore amply appears that the decision of the Circuit Court of Appeals for the Seventh Circuit in this case is *directly in conflict upon a question of Federal law* with the decisions of all the other Circuit Courts of Appeals and with the decisions of this Court upon the same question.

The question involved is important. Litigants should not be deprived of their rights in one of the Circuit Courts of Appeals to an appeal and a decision *upon the merits* of a controversy which the Federal Statutes and the relevant decisions of the other Circuits and of the Supreme Court all uniformly grant *as a matter of right*.

As to the second question, *i.e.*, whether Rule 75 was intended to permit the addition of matter not before the District Court when the interlocutory order appealed from was entered, there is no decision of the Circuit Courts of Appeals or of this Court. While it is important that the new Federal Rules of Civil Procedure be interpreted by this Court when the occasion arises, it is imperative that such Rules be not so construed as to deprive the Circuit Courts of Appeals (or this Court) of their right to inform themselves of matters relevant to an appeal transpiring in

the trial court at any time prior to final judgment in the appeals court.

As to the third question, this involves a determination of the conflict of laws between the States, which it is of the utmost importance that this Court pass upon and decide, as clearly no court except this Court can determine such conflicts between the laws of the several States. It is definitely the modern policy of the law to prevent useless and expensive ancillary administrations; and this case presents an extreme illustration of this principle.

Wherefore, petitioner prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; that said final order of said Circuit Court of Appeals be reversed or altered by this Honorable Court; and petitioner also prays for such other, further or different relief as may seem proper.

And this petitioner will ever pray, etc.

JOHN T. DEMPSEY, as Administrator  
of the Estate of Gabriel de  
Fontarce, deceased,

*Petitioner,*

By LEWIS E. PENNISH,  
*Counsel for Petitioner.*

NORMAN CRAWFORD,  
Of Counsel.

